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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 429

MOSES B. SHERR, PETITIONER

v.

ANACONDA WIRE & CABLE COMPANY AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 47–54) is reported in 57 F. Supp. 106. The opinion of the United States Court of Appeals for the Second Circuit (R. 60–62) is reported in 149 F. 2d 680.

JURISDICTION

The opinion of the Circuit Court of Appeals was entered on May 25, 1945 (R. 60). A petition for rehearing (R. 62) filed by petitioner was denied on June 8, 1945 (R. 68). The judgment

was entered June 16, 1945 (R. 69). The petition for a writ of certiorari was filed on September 13, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the amendment of December 23, 1943 to Rev. Stat. §§ 3490–3493 and 5438, providing that the United States District Courts shall have no jurisdiction to proceed with any *qui tam* suit pending thereunder if based upon information in the possession of the United States at the time the suit was brought, is constitutional as applied to the instant case.

STATUTES INVOLVED

Rev. Stat. §§ 3490–3493 and 5438, as they read prior to the enactment of Pub. L. 213 on December 23, 1943, and Pub. L. 213 are set forth in Appendices A and B, pp. 16–23, *infra*.

STATEMENT

On December 21, 1942, the respondent Anaconda Wire & Cable Company and certain of its officials and employees were indicted by a Federal Grand Jury in the Northern District of Indiana for the commission of certain frauds upon the United States at Anaconda's plant in Marion, Indiana (R. 17). On the next day, December 22, 1942, an account of the indictment appeared in the press (R. 22–25).

The following day, December 23, 1942, petitioner, a private individual, commenced the instant action by filing a complaint (R. 3–6) in the United States District Court for the Southern District of New York under Rev. Stat. § 3491, against Anaconda and the other defendants named in the indictment, to recover damages and forfeitures under Rev. Stat. §§ 3490 and 5438, on account of the commission of specified frauds upon the United States, which in general were the same as the fraudulent practices for which those defendants had been indicted (R. 17).[1] Only Anaconda was served in the instant suit.

On December 23, 1943, Rev. Stat. § 3491 was amended to provide that within 60 days after notice to the United States of the pendency of

[1] Rev. Stat. § 5438 prohibits, under penalty of fine and imprisonment, the making of a false claim against the Government of the United States or otherwise defrauding or attempting to defraud it. Rev. Stat. § 3490 provides that any person who commits such an act "shall forfeit and pay to the United States" $2,000 plus "double the amount of damages" sustained by the United States, with costs, all to be sued for in the same suit. By Rev. Stat. § 3491 as in effect prior to December 23, 1943, "Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States * * *." Rev. Stat. § 3493 prior to December 23, 1943 provided that "The person bringing said suit and prosecuting it to final judgment shall be entitled to receive" one-half the forfeiture and damages "he shall recover and collect," the other half "shall belong to and be paid over to the United States * *. *." (See Appendix A, pp. 16–19, *infra.*)

any *qui tam* suit brought thereunder before or after the amendatory act, the United States may enter an appearance therein and carry on the suit (57 Stat. 608–609, § 3491 (C) and (D)).[2] Pursuant to that provision, the United States was given notice of the instant suit and on March 6, 1944, duly filed an entry of appearance therein.

The amendment of December 23, 1943, also provided that:

> The court shall have no jurisdiction to proceed with any * * * pending [*qui tam*] suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending [on December 23, 1943] if before such suit was

[2] The 1943 amendment also repealed Rev. Stat. § 3493 and provided that if the United States carries on the suit, the court "may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought", but not more than $\frac{1}{10}$ of the proceeds or settlement (§ 3491 (E) (1)). If the suit is not carried on by the United States, the court may award an amount, not more than $\frac{1}{4}$ of the proceeds or settlement, "which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages" (§ 3491 (E) (2)).

> filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.[3]

Relying upon this provision, the United States filed a motion in the district court for an order determining that petitioner's action was based upon evidence and information in the possession of the United States at the time it was brought and, in the event such a determination was made, for an order staying petitioner's action until final adjudication of the Government's own civil suit which it had instituted shortly before on account of the frauds in question (R. 11–12).[4] At the

[3] The 1943 amendment, as the legislative history reveals, was primarily designed by Congress to terminate the practice then becoming increasingly apparent, whereby third persons having no relationship to the frauds against the Government were racing to file informer's actions based solely upon information derived from newspaper accounts of criminal indictments, antitrust complaints, and the like, without themselves making any contributions by way of disclosure or investigation. H. Rept. No. 263, 78th Cong., 1st Sess.; S. Rept. No. 291, 78th Cong., 1st Sess. For an example of the situation to which the amendment was directed, see *United States* v. *Baker-Lockwood Mfg. Co.*, 138 F. 2d 48 (C. C. A. 8), certiorari granted and decision vacated *sub nom. Nathanson* v. *United States*, 321 U. S. 746, where a *qui tam* plaintiff succeeded in filing a complaint one day after the return of an indictment and two calendar days prior to the filing of a civil suit by the Government in its own behalf.

[4] The Indiana criminal proceedings terminated with the entry of pleas of *nolo contendere* on the part of all defendants therein and the levying of fines against them on June 12, 1943

same time, Anaconda moved to dismiss petitioner's action on the ground that the court had no jurisdiction thereof under the 1943 amendment (R. 28–29). Petitioner moved to strike the United States' entry of appearance in the instant action on the ground that the 1943 amendment authorizing it was unconstitutional, and requested an order permitting him to continue the prosecution of his action (R. 10).

At the hearing of the motions, petitioner conceded that his action was based, not upon any original information, but solely and entirely upon evidence and information already in the possession of the United States, its officers and agents at the time the suit was brought, and that he

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(R. 18). Shortly after the return of the Indiana indictment, however, Anaconda and certain other of its officials were indicted for the commission of similar frauds at its Pawtucket, Rhode Island, plant (R. 17). The Rhode Island proceedings were not terminated until January 18, 1944, when the defendants were convicted after a trial and sentenced (R. 18). The Government did not deem it advisable to bring a civil action of its own to recover for the alleged Indiana frauds until after the termination of both criminal cases (R. 18–19). Accordingly, on May 16, 1944, the United States, after it had completed its investigation of the frauds charged in the Indiana indictment, filed its own civil action, pursuant to Rev. Stat. §§ 3490 and 5438, against Anaconda and its Indiana officials named as defendants in petitioner's suit, seeking forfeitures and damages on account of the frauds which formed the basis of the Indiana indictment (R. 19, 28, 56). A civil action brought by the Government on account of the Pawtucket frauds was filed January 18, 1943, and is also pending in Rhode Island (R. 13).

neither had nor furnished any information concerning the case to the Attorney General prior to bringing the action (R. 35, 49–50). The district court thereupon granted Anaconda's motion to dismiss, holding the 1943 amendment constitutional as applied to petitioner's suit; denied petitioner's motion in its entirety, and denied that part of the motion of the United States which requested a stay of the instant suit (R. 45–47). On appeal by petitioner, the court below affirmed the judgment of the district court (R. 60–62, 69).

ARGUMENT

Petitioner concedes that his suit, which was filed the day following a newspaper account of the defendant's indictment in Indiana, was not based upon any original information (R. 35), and as the court below noted (R. 61) his activities in the case until the Government filed its appearance therein, consisted only of filing a complaint and effecting service thereof on Anaconda alone (R. 17). In these circumstances, petitioner argues that he obtained a vested property or contract right to prosecute his action to final judgment and to receive, if successful, one-half the ultimate recovery as formerly provided in Rev. Stat. § 3493; and that this "right" is constitutionally immune from legislative abridgment. The rejection of this contention by the lower court is so clearly correct that review by this Court is, we

submit, not warranted, particularly in view of the narrow issue involved.

1. The decision below is correct.

(a) The established rule since the dawn of *qui tam* actions more than four centuries ago has been that until the informer recovers judgment, he obtains no vested rights in the suit which are immune to curtailment or termination by the legislature. In the words of Blackstone (*Commentaries,* Vol. 2, (Lewis Ed., 1900) p. 437):

> But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law * * * and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,
>
> I. Such penalties as are given by particular statutes, to be recovered in an action *popular* * * *. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, *or of anything but parliament,* to release the informer's interest. [Italics supplied.] [5]

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[5] Petitioner's historical references (Pet. 13–16) are all concerned with denying the power of the King, by pardon, release, or compromise, to discharge the defendant in a *qui tam* action from that portion of the recovery which goes to the informer. No authority cited in the petition questions or denies the power of the legislature to modify or terminate *qui tam* actions by amending the authorizing legislation. *Couch* v. *Jeffries*, 4 Burr. 2460, 98 Eng. Rep. 290 (1769),

Consistent with these historical principles, the American authorities universally agree that the institution of a *qui tam* suit does not create any vested right in the plaintiff which is immune to a subsequent legislative modification or repeal of the statute authorizing it. *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475 (1853); *Chicago & Alton R. R. Co.* v. *Adler,* 56 Ill. 344, 350 (1870); *Mix* v. *Ill. Cent. R. R. Co.,* 116 Ill. 502 (1886); *Allen* v. *Farrow,* 2 Bailey 584 (S. C. 1831); cf. *Commonwealth* v. *Welch,* 32 Ky. 330 (1834); *United States* v. *Twenty-Five Thousand Gallons of Distilled Spirits,* Fed. Cas. No. 16564 (C. C. S. D. N. Y.), affirming Fed. Cas. No. 14282 (S. D. N. Y.).[6] This accords with the estab-

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cited by petitioner (Pet. 15), involved a question of statutory construction but implies that had Parliament used not "general words" but specific language expressing a plain intent to affect pending *qui tam* actions, the court would have given it effect, even though the plaintiff there had prosecuted his case to a verdict in his favor. See *Coles* v. *County of Madison,* 1 Breese (Ill.) 154 (1826); *Pope* v. *Lewis,* 4 Ala. 487, 491–492 (1842).

The distinction between the legislative and executive power over informer suits has a rational basis. *Qui tam* actions are the result of a declared legislative policy of discovering and redressing public wrongs through the medium of private informer suits; to permit the King to terminate any such suit without the sanction of Parliament would enable the executive to repeal the legislation *pro tanto.*

[6] *United States* v. *Griswold,* 24 Fed. 361 (D. Ore.), affirmed, 30 Fed. 762 (C. C. Ore.), and *McLane* v. *United States,* 6 Pet. 404, relied upon by petitioner (Pet. 16, 20), are inapposite. The former dealt with an attempt by an *executive* to compromise the liability of a defendant against whom

lished rule in the field of legislation providing for the recovery of private penalties by injured persons; and here the cases agree that the institution of suit does not create any vested right against a subsequent legislative modification or repeal of the enabling act. *Norris* v. *Crocker,* 13 How. 429, 439; *State of Maryland* v. *B. & O. R. R. Co.,* 3 How. 534; cf. *Union Iron Co.* v. *Pierce,* Fed Cas. No. 14367 (C. C. D. Ind.); *United States* v. *Morris,* 10 Wheat. 246, 287–292; cf. also *Western Union Tel. Co.* v. *L. & N. R. R. Co.,* 258 U. S. 13, 20.

Against the background of centuries of informer legislation, frequently amended or repealed, the absence of a single decision denying the legislature's right to interfere with pending *qui tam* litigation is eloquent testimony of the legislature's plenary powers in this field. The petitioner seeks to escape the force of this solid body of decisions by attempting to distinguish between a repeal of legislation imposing a penalty, thus indicating a change in the Government's "penal" policy, and an act such as Public Law 213, reducing the informer's rights of recovery, which he characterizes as a "reconveyance" of those rights to the Government (Pet. 19–20). This distinction is unsound, for a "property right" entitled to protec-

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final judgment had been recovered by the *qui tam* plaintiff; the latter involved a question of statutory interpretation resulting in the holding that Congress did not intend a remission of the informer's share in the penalty.

tion against legislative curtailment or destruction, would be invulnerable to either type of statute. Moreover, many of the cases upholding legislative curtailment of the private right to recover a penalty did not involve a change in the "penal policy" of the sovereign since some penalty—often more stringent than that superseded—still attached to the commission of the acts proscribed by the earlier legislation. Cf. *Norris* v. *Crocker,* 14 How. 429; *Parry, qui tam* v. *Croyden Gas Co., Ltd.,* 15 C. P. (n. s.) 568 (1863); *United States* v. *Twenty-five Thousand Gallons of Distilled Spirits,* Fed. Cas. No. 14282 (S. D. N. Y.), affirmed Fed. Cas. No. 16564 (C. C. S. D. N. Y.); *Mix* v. *Ill. Cent. R. R. Co.,* 116 Ill. 502; *Bank of St. Mary's* v. *Georgia,* 12 Ga. 475; *Nichols* v. *Squire,* 22 Mass. (5 Pick.) 168; *Chicago & Alton R. R. Co.* v. *Adler,* 56 Ill. 344.

(b) Petitioner's contention that the institution of a *qui tam* action gives rise to a contract right against the sovereign (Pet. 20–25) is likewise contradicted by the unanimous body of American authorities. *Atwood* v. *Buckingham,* 78 Conn. 423; *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475; *Coles* v. *County of Madison,* 1 Breese (Ill.) 154; *Cushman* v. *Hale,* 68 Vt. 444. The statute under which petitioner asserts his "contract right", Rev. Stat. §§ 3491–3493 prior to the 1943 amendment, makes it clear that the informer's rights are limited to sharing in the judgment when and if one is recovered. In the

language of Congress, "The person bringing said suit *and prosecuting it to final judgment* shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall *recover and collect*" (§ 3493). [Italics supplied.] There was plainly no undertaking by the United States to pay or secure anything to the informer upon his bringing suit, or to do any other act; prior to recovery and collection by the plaintiff in the *qui tam* suit, he has nothing but an expectancy, contingent upon the fulfillment of the statutory provisions. Even after judgment, he would not be entitled to receive anything from the United States, but only the statutory moiety of the sum collected from the defendant. See *United States* v. *Griswold*, 24 Fed. 361, 365 (D. Ore.), affirmed, 30 Fed. 762 (C. C. D. Ore.).

The absence of any contractual relationship between the plaintiff and the Government, such as would inhibit legislative curtailment of the suit, is underscored by the fact that a *qui tam* plaintiff assumes no obligation when he institutes suit; indeed, there is no way to compel him to continue his suit to final judgment, or to recover damages for refusal to do so.[7]

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[7] Petitioner's claimed affirmative duty to continue his *qui tam* suit to final judgment (Pet. 20–21) is wholly illusory. The provision that a *qui tam* suit is not to be withdrawn nor discontinued without consent of the District Attorney and court in which the action was filed (R. S. § 3491) is merely

(c) Finally, as was suggested in the *per curiam* opinion below (R. 61–62), if petitioner has any vested rights which have been impaired by Public Law No. 213, it is not to be assumed that he is without a remedy. Assuming, as petitioner contends (Pet. 20), that he has a contract with the United States similar to an agreement to perform legal services, he may maintain a suit in the Court of Claims for its breach. 28 U. S. C. § 250.[8] Moreover, if petitioner has a property right in the action that is protected by the Fifth Amendment, and if Public Law No. 213 constitutes a taking of that right by the Government for which compensation is constitutionally required, as he asserts is the case (Pet. 13), the resultant taking would support a suit for compensation in the Court of Claims. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 20–23; *Hurley* v. *Kincaid*, 285 U. S. 95, 104, 105. Accordingly, Public Law No. 213, which withdrew jurisdiction from the district courts over informer suits of this type, falls

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designed to eliminate the possibility of collusion between a *qui tam* plaintiff and the defendant, and goes no further than Rule 23 (c) of the Federal Rules of Civil Procedure providing that class suits are not to be dismissed or compromised without the approval of the court. *Russell* v. *Sebastian*, 233 U. S. 195, cited by petitioner as authority for the proposition that a contract exists, is inapposite. It deals, as is shown by the authorities cited (*Id.* p. 204) with the rights of a public utility under a franchise.

[8] The right to revoke such a contract and to relegate the attorney to a *quantum meruit* claim is established. *In re Paschal*, 10 Wall. 483, 496.

well within the constitutional authority of Congress to withhold or withdraw jurisdiction from the district courts over designated classes of controversies. *Lockerty* v. *Phillips*, 319 U. S. 182, 187–188, 189; *United States* v. *Union Pacific R. R. Co.*, 98 U. S. 569, 603; *Bank of Columbia* v. *Okely*, 4 Wheat. 235, 245; cf. *Lynch* v. *United States*, 292 U. S. 571, 582.

2. The issue involved here is raised in only two pending suits.[9] Moreover, there is no conflict. The constitutionality of the abatement provisions of Public Law No. 213, which applies to *qui tam* plaintiffs such as petitioner who have furnished no new evidence or information to the Government, has been upheld by every court which has had occasion to consider its validity. *U. S. ex rel. McLaughlin* v. *Am. Chain & Cable Co.*, Civil No. 20–252 (S. D. N. Y., April 18, 1945); *U. S. ex rel.*

[9] Contrary to petitioner's assertion (Pet. 10), the decision below does not affect 250 pending *qui tam* actions. The files of the Department of Justice, which may be taken accurately to reflect the situation (see Sec. 3491 (D) of Public Law No. 213) reveal that 51 *qui tam* actions were pending when the amendment was enacted; that all but 18 of these have been finally disposed of; and that in only 2 of the 18 is an issue raised as to the constitutionality of Public Law No. 213. *United States ex rel. Bayarsky* v. *Brooks* and *United States ex rel. Hewitt* v. *Pittman*, now pending on appeals by the United States in the Second and Fifth Circuits, involve the statutory interpretation and not the constitutionality of Public Law No. 213. There the abatement of the informer suits, on the defendant's motion, was over the objection of the United States, which did not have an independent suit pending.

Nitkey v. *Dawes,* No. 43C574 (N. D. Ill., Dec. 18, 1944); *U. S. ex rel. Nathanson* v. *Baker-Lockwood Mfg. Co.,* No. 1407 (W. D. Mo., June 20, 1944); *U. S. ex rel. Ryan* v. *Broderick,* No. 4806 (D. Kan., April 27, 1944); cf. *U. S. ex rel Rodriguez* v. *Weekly Publications, Inc.,* 144 F. 2d 186 (C. C. A. 2), affirming 54 F. Supp. 476 (S. D. N. Y.).

CONCLUSION

The decision below is correct and no conflict exists. We respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER, 1945.